Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

L.E.S. PROPERTIES, HOTEL VENTURE, L.P.,
A California limited partnership,

Petitioner,

v.

WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Does the Seventh Amendment require a district court to enter a judgment based on the true intent of a jury in rendering its verdict as clarified by written interrogatory?

   A. Did the District Court/Court of Appeals violate the Seventh Amendment in this case by entering/upholding a judgment which is inconsistent with the jury's verdict as clarified by subsequent interrogatory?

2. Does the Ninth Circuit's decision affirming a judgment which is inconsistent with the jury's true intent conflict with previous decisions of this Court?

3. Does the Ninth Circuit's decision disapproving of the District Court's submission of an additional interrogatory to a still-impanelled jury upon learning of an error in the recordation of the jury's verdict and resulting affirmance of a judgment which is inconsistent with the jury's true intent conflict with the decisions of other Circuit Courts of Appeal?

4. Did the District Court violate the Seventh Amendment by striking down a jury's punitive damage award which was supported by substantial evidence?

5. Should the United States Supreme Court exercise its "power of supervision" over all inferior federal courts to compel the District Court to give effect to the jury's true intent as stated in its answer to a clarifying interrogatory and/or to direct the Circuit Court of Appeals to afford a judgment which ignores the jury's true intent something more than cursory review?

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner L.E.S. PROPERTIES HOTEL VENTURE, L.P. ("L.E.S." or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on May 31, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix at pages

App. 1-5. The United States Court of Appeals for the Ninth Circuit's order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc (filed August 16, 1994) is reprinted in the Appendix at pages App. 6-7.

JURISDICTION

The jurisdiction of the District Court to decide this controversy was invoked under 28 U.S.C. § 1332(a)(1).

The Court of Appeals exercised jurisdiction over this case based on the timely filing of an appeal from a final judgment under 28 U.S.C. § 1291.

Petitioner seeks the exercise of jurisdiction by this Court under 28 U.S.C. § 1254. The petition has been filed within the time prescribed by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

INTRODUCTION

It is undisputed that the judgment entered by the District Court in this case does not accurately reflect the

intent of the jury as clarified by the record of events subsequent to the verdict but before the jury was discharged. Based on substantial evidence presented at trial, the jury intended to award compensatory damages to Petitioner in the amount of approximately $5.57 million. Before the jury was discharged, the District Court and the parties learned that the jury had erred in recording its verdict on the form provided by the District Court. The jury's true intent was revealed in a subsequent interrogatory submitted by the District Court to the jury for the purpose of clarifying the verdict.

During post-trial proceedings, the District Court (Marquez, D.J.) determined that the jury's answer to the subsequent interrogatory should not be considered in construing the verdict and, as the result of the application of purely legal concepts concerning overlapping theories of recovery, entered a judgment awarding Petitioner only $1.4 million in compensatory damages. The District Court also granted Respondent's motion for judgment as a matter of law (FRCP 50), eliminating a $2 million punitive damage award rendered in favor of Petitioner by the jury.

Petitioner's appeal from the judgment raised substantial issues of law upon which rested over $6 million dollars in additional damages. Nevertheless, the matter received only the most perfunctory consideration by the United States Court of Appeals for the Ninth Circuit (Kozinski and Trott, Circuit Judges; Williams, District Judge, sitting by designation), underscored by oral argument designed to curtail, rather than foster, any meaningful discussion of the issues and a 3½ page cursory decision signalling the intermediate appellate court's contempt for the jury's deliberative process.

Petitioner's subsequent petition for rehearing and suggestion of rehearing en banc was denied.

STATEMENT OF FACTS

Petitioner L.E.S. Properties Hotel Venture ("L.E.S.") is a California limited partnership. Respondent Westin Hotel Company ("Westin") is in the business of designing, developing, marketing and managing first-class hotel facilities and is the oldest hotel management company in the United States.

In the late summer/early fall of 1988, high-level Westin executives met with representatives of L.E.S. to discuss development of a Westin-managed hotel on undeveloped property (near downtown San Diego) on which L.E.S. held an option. Westin's representatives encouraged L.E.S. to purchase and develop the property as a Westin facility. Of course, to develop the property as a Westin facility, L.E.S. would have to meet Westin's specifications and was encouraged by Westin representatives to hire Westin to prepare an initial written projection of the estimated results of hotel operations for the first five years (a "proforma") in order to secure construction financing. In making its pitch, Westin touted its superior skill, knowledge and expertise in the hotel industry.

In reliance on these representations and Westin's professed continuing interest in the development of the project, L.E.S. exercised its option to purchase the property and expended a sizable sum of money to obtain expanded conditional use permits for the project.

Westin and L.E.S. also entered into a written letter agreement (the "Letter Agreement") drafted by Westin, in which Westin promised to promptly deliver the required proforma.[1] The Letter Agreement stated that upon the completion of the proforma, the parties would execute a Pre-Opening Services Agreement and Management Agreement, by which Westin would gain the exclusive right to operate L.E.S.'s hotel for a considerable fee over the next 20 years.

Although L.E.S. paid Westin over $100,000 in fees and expenses on the Letter Agreement, Westin failed to deliver the initial proforma within the time promised. Westin offered L.E.S. several excuses for its failure to provide the necessary proforma and urged L.E.S. to sign the Pre-Opening Services Agreement and Management Agreement without seeing the financial data. Unbeknownst to L.E.S., by this time, Westin had actually generated two proformas. However, both of these proformas indicated that the development of a Westin Hotel on the property was **not** economically feasible. These proformas were not disclosed to L.E.S.[2]

In fact, Westin did not produce a proforma for the project until L.E.S. refused to execute the Pre-Opening and Management Services Agreements. Not surprisingly,

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[1] The evidence indicated that the parties expected that a proforma would be generated within 60 to 90 days. This time frame was consistent not only with Westin's own custom and practice, but also the custom and practice of the hospitality industry.

[2] L.E.S. learned of the existence of these proformas only through discovery in the instant litigation.

the third proforma generated by Westin was highly favorable – projecting a high cash flow for debt service for the first five years of operation. Unfortunately, as Westin admitted at trial, the third proforma was false and inaccurate. It was purposely prepared to make the economic projections on the proposed hotel look as attractive as possible and deter L.E.S. from seeking another operator.

Westin's plan was successful. In reliance on Westin's admittedly false and inaccurate projections, L.E.S. executed the Pre-Opening Services and Management Agreements.

However, the deception did not stop with the execution of these agreements. Despite its analysis indicating that the project was economically unfeasible, Westin representatives continued to assure L.E.S. of the viability of the project and of Westin's commitment to its success. Westin was, after all, in a "no-risk" position. Westin encouraged L.E.S. to continue its efforts to obtain construction financing for the proposed hotel and even stood silent when L.E.S. retained a mortgage brokerage firm (at considerable expense) to find an equity partner or syndicate the proposed hotel.

In January 1988, Westin was taken over by Aoki Corporation, a large Japanese construction company whose primary objective was to significantly expand its management and development operations throughout the world. By 1989, all of the high-level executives at Westin who had been working on the L.E.S. project had been replaced by Aoki employees, who expressed concerns about the viability of the L.E.S. project. As a result of these changes, Westin re-evaluated its involvement in the

project and decided to pursue another location in San Diego closer to the water.

In July 1989, Westin generated yet another proforma which projected insufficient earnings to service the debt on the property and stood in stark contrast to the admittedly false figures concocted by Westin in the third proforma. Signalling that it knew the fourth proforma would be the death knell of the project, Westin hand-delivered the fourth proforma to L.E.S. without explanation.

The effect on the project was as predicted. L.E.S. could not obtain financing for the project and the development of the property was halted. Due to a downturn in the economy, L.E.S. could not sell the property. The development permit for the property expired in 1992.

STATEMENT OF CASE

L.E.S. filed suit against Westin in the United States District Court for the Southern District of California. In its first amended complaint, L.E.S. advanced seven claims for relief, including claims for fraud, negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing.

During the course of the seven-day trial, L.E.S. presented evidence that, after inducing L.E.S. to enter into the Letter Agreement based on Westin's alleged superior skill and knowledge of the hotel industry, Westin had intentionally misrepresented and/or concealed material facts from L.E.S. to persuade it to continue with the development of the property, thereby allowing Westin to

collect fees and other incentives with no risk to Westin. In its defense, Westin argued that its conduct with regard to the proformas was, at most, the result of "honest" differences of opinion in business judgment within Westin.

The evidence at trial demonstrated that as a result of Westin's conduct, L.E.S. had suffered actual out-of-pocket losses totalling more than $1 million dollars and a projected diminution in the value of the subject property of over $6 million.

After considering all the evidence, the jury rendered its verdict on the special verdict form prepared by the court. The verdict was against Westin in the aggregate sum of $5,570,250, divided among the various claims for relief as follows: $375,000 on the negligence claim (subject to 25% reduction for L.E.S.'s contributory negligence); $500,000 on the breach of covenant of good faith and fair dealing claim; $1,444,000 on the breach of contract claim; $1,457,000 on the negligent misrepresentation claim; $944,000 on the intentional misrepresentation claim; and, $944,000 on the intentional concealment claim.

During the punitive damages stage of the trial, the jury learned (in connection with its consideration of the ratio between punitive and compensatory damages) that L.E.S. would receive only the single largest award of the compensatory damages on the special verdict form (i.e., $1,457,000).[3] At the first opportunity during deliberations

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[3] Given the lack of any evidentiary basis for varying awards on its theories of recovery, L.E.S. suspected that the jury had erroneously apportioned its damages award among the various causes of action. Prior to the commencement of the

on punitive damages, the jury inquired by way of written question to the court: "Are the damages that were awarded accumulative [sic]?" The district judge called in counsel and the jury. In response to the judge's oral inquiry regarding the meaning of this question, the jury foreperson explained:

> **We just want to make sure the damages awarded in each one of those counts – are those, at the end, cumulative? All of the amounts that we added up – we had a certain figure that we were going to award. We wanted to make sure that we understand they were all cumulative damages.**

In short, the jury wanted to know (prior to deliberating on the punitive damages issue) whether its compensatory damage awards were going to be aggregated as intended. In response to the inquiry, the district court submitted a single additional written question to the jury: "On your verdict dated September 3, 1992, did you intend to award L.E.S. the total of all claims, which is $5,570,250?" The jury then retired to resume deliberations.

Within nine minutes, the jury returned with a verdict awarding punitive damages against Westin in the sum of $2 million, and an **affirmative answer** to the district court's question, indicating that the jury's intent was to

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punitive damages phase of the trial, L.E.S. requested on two separate occasions that the court inquire whether the jury intended to award the aggregate of the sums listed for each claim on the verdict form. The court denied L.E.S.'s requests.

award L.E.S. compensatory damages in the total sum of $5,570,250.

Following the verdict, L.E.S. requested entry of judgment in the amount of $7,570,250 (i.e., $5,570,250 in compensatory damages, plus $2,000,000 in punitive damages) based on the jury's verdicts. Westin objected to the proposed judgment, arguing that the compensatory damages on the verdict could not be aggregated, despite the jury's clear intent to award the entire sum. In its reply, L.E.S. noted that entry of a judgment in an amount less than intended by the jury would violate the Seventh Amendment.

During the post-trial proceedings, the District Court determined that the interrogatory submitted to the jury in response to the suggestion that the damages should be aggregated was "inappropriate." The District Court also struck the jury's punitive damage award pursuant to F.R.C.P. 50(a) finding L.E.S. had not proven the requisite fraud by clear and convincing evidence. Judgment was thereafter entered in favor of L.E.S. in the amount of $1,457,000.

L.E.S. appealed the judgment on the ground that it did not accurately reflect the jury's findings with regard to damages. In briefing the issue, L.E.S. presented case authority holding that a judgment which does not accurately reflect the jury's findings violates the Seventh Amendment of the U.S. Constitution.

Despite the significance of the issues involved and the substantial amount of money at stake, the Ninth Circuit panel expressed indifference to the Seventh

Amendment guaranty to jury trial.[4] On May 31, 1994, the Court issued a 3½ page memorandum opinion affirming the District Court's judgment as consistent with the jury's award of "various amounts on the various theories of recovery" on the special verdict form. The Court opined (without any discussion of the authorities from other circuit courts of appeals cited by L.E.S.) that the District Court had properly ignored the jury's subsequent indication of a different intent because the aggregation of the awards was a "question of law" outside the province of the jury.

The panel's treatment of L.E.S.'s challenge to the eradication of the jury's punitive damage award was equally perfunctory: "[T]he evidence L.E.S. presented did not sufficiently support an award of punitive damages."

L.E.S.'s Petition For Rehearing And Suggestion Of Rehearing On En Banc was denied on August 16, 1994. Appendix, App. 6-7.

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[4] The Court's position is typified by the following exchange early during oral argument:

Mr. Strauss: . . . [It is] not in dispute and not in issue in this case that this jury intended to award my clients $5.5 million in compensatory damages and $2.0 million in punitive damages. . . .

J. Kozinski: **So what if that is what they intended.** . . . What does the jury's hopeful wish in that regard have to do with anything?

REASONS FOR GRANTING WRIT

I.

THE DISTRICT COURT/COURT OF APPEALS VIOLATED THE SEVENTH AMENDMENT IN THIS CASE BY ENTERING/UPHOLDING A JUDGMENT WHICH IS INCONSISTENT WITH THE JURY'S VERDICT AS CLARIFIED BY SUBSEQUENT INTERROGATORY.

As noted above, the right to trial by jury on all issues of fact is guaranteed to Petitioner by the Seventh Amendment of the United States Constitution.

"The aim of the [Seventh] Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, ... " *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1934). As such, the Amendment not only preserves the right to request a jury trial, its "studied purpose" is to prevent encroachment of the right by the court as the result of the imposition of procedural restrictions and/or an unauthorized re-examination of the facts. *Id.*; see also *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-379 (and cases cited therein) [any mode of trial which endangers the right of trial by jury is an "infraction of the Seventh Amendment"].

Obviously, the jury's role in our judicial system[5] is skewed if the judgment entered by the District Court

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[5] Several courts have opined that the purpose of the jury is to inject a certain amount of "flexibility" into the judicial process. *Guidry v. Kem Mfg. Co.*, 598 F. 2d 402, 405 (5th Cir. 1979) [the law "permits the jurors to import notions of lay justice, to temper legal rules and to render a verdict based on their consciences and ideas of how the case ought to be decided without strict compliance with the rules laid down by the court."].

does not "reflect the true intent of the jury." See *Attridge v. Cencorp Division of Dover Technologies International, Inc.*, 836 F.2d 113, 114 (2d Cir. 1987). For that reason, this Court has recognized that the Seventh Amendment mandates that a trial judge interpret the jury's verdict so as to accomplish the jury's true intent. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).[6] Simply put, the Seventh Amendment "precludes entry of a judgment that disregards any material jury finding." See *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-891 (2d Cir. 1988) [and cases cited therein].

II.

THE NINTH CIRCUIT'S DECISION DISAPPROVING OF THE DISTRICT COURT'S CLARIFICATION OF A STILL-IMPANELLED JURY'S VERDICT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

As noted above, the Ninth Circuit's decision in this case confirmed the district judge's suggestion that it was inappropriate to use a supplemental written interrogatory to clarify the verdict rendered by the still-impanelled jury. In so ruling, the Ninth Circuit has signalled its intent to follow a path which directly conflicts with decisions of other Circuit Courts of Appeal.[7]

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[6] Since the Ninth Circuit's decision affirms a judgment which is inconsistent with the jury's true intent, it also conflicts with previous decisions of this Court.

[7] The emergence of this conflict has been recognized in previous decisions. *McCullough v. Consolidated Rail Corp.*, 937 F. 2d 1167, 1172 (6th Cir. 1991); *Ferrante v. Metro-North Commuter R.R.*, 738 F.Supp. 106, 108-109 (S.D.N.Y. 1990) [recognizing a "difference of opinion" between the circuits].

The Eleventh Circuit, for example, has instructed the district courts within its jurisdiction that when examining the verdict for the jury's intent, the district court should consider not only the jury's "categorical answers" (i.e., the yes-or-no responses or the bottom-line dollar figures) to the questions submitted, but also any specific explanation the jury offers for its answers. *Royal Cup, Inc. v. Jenkins Coffee Service, Inc.*, 898 F.2d 1514, 1522-23 (11th Cir. 1990).

Likewise, the Third Circuit has recognized the wisdom of ensuring that the verdict reflects the jury's true intent:

> It would be anomalous to hold that, while a court . . . must search for a view of the case which will make the jury's answers consistent, it may not submit an additional interrogatory to the jury to clarify an ambiguity. (Citation omitted.) Moreover, in purely pragmatic terms, it seems terribly inefficient not to obtain clarification from a still-impanelled jury of the meaning of its answers and verdict, especially when we consider that unclarified inconsistent answers often necessitate a retrial of the entire case. *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 575-576 (3rd Cir. 1983).

The Second Circuit has concluded that "[u]nyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended." *Attridge v. Cencorp Division of Dover Technologies International, Inc., supra,* 836 F.2d at 114. Where (as here) the jury's statements and the trial court's question allow the court to "ascertain what the

jury decided and not why they did so," the information should properly be considered in framing the appropriate judgment. *Id.*, at 117.[8]

The Sixth Circuit has adopted the procedure recommended by the Eleventh Circuit in *Attridge* as the "better reasoned approach." *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1172 (6th Cir. 1991). The court noted that the interests of justice are served by assuring that the plaintiff received the verdict intended by the jury. *Id.* Especially, where (as here) "the jurors themselves brought the mistake in the verdict to the court's attention." *Id.*[9]

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[8] In *Attridge*, the jury awarded the plaintiffs a "total verdict amount" of $150,000. After the jury was discharged, two of the jurors told the courtroom deputy (who subsequently informed the judge) that contrary to the court's instructions, the jury had reduced its award by plaintiffs' comparative negligence and that the $150,000 verdict represented the net recovery due after such a reduction.

The district judge recalled the jury and asked each juror the following question: "What was your understanding as to what the verdict was; what was the jury verdict?" Based on the juror's clarifying responses, the district court entered judgment in the full amount of $150,000. On appeal, the Second Circuit approved the procedure used by the district judge, finding "the interviews were intended to resolve doubts, resolving the accuracy of the verdict announced, and not to question the process by which those verdicts were reached." *Id.* at 117.

[9] In *McCullough*, the jury awarded the plaintiff "total damages" in the sum of $235,000. Following the jury's discharge, while thanking the jurors informally, the judge realized that the jury had intended the net recovery, after deductions for contributory negligence, to be $235,000. Over the objection of defense counsel, the judge reconvened the jury and asked the foreman: "[W]as it the intention of the jury to bring back an award of

III.

THE DISTRICT COURT VIOLATED THE SEVENTH AMENDMENT BY STRIKING DOWN A JURY'S PUNITIVE DAMAGE AWARD WHICH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

As previously noted, the Seventh Amendment states that it is the province of the jury to decide all material facts and then render a decision based on those facts. Under the Seventh Amendment, the district court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ["credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts **are jury functions, not those of a judge** . . . " (emphasis added)]; *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978); *California Computer Products, Inc. v. International Business Machines*, 613 F.2d 727, 733 (9th Cir. 1979).

$235,000 minus the 50% [contributory negligence]?" In open court and on the record, the foreperson responded that this was not the jury's intention. In explanation the foreperson stated:

> The intention was – total awards – the $235,000 would have been awarded to plaintiff. It should have read $470,000 minus the 50%. *Id.* at 1168.

To accomplish the jury's true intent, the district court entered judgment for plaintiff in the amount of $235,000. On appeal, the Sixth Circuit affirmed the procedure employed by the district court, noting that the trial judge had "inquired only as to the [jury's] intended verdict." *Id.* at 1172. In doing so, the judge had not elicited any testimony about the process by which the jury reached its verdict, but "merely asked for clarification of the final award." *Id.*

For this reason, the Court has instructed that a motion for judgment as a matter of law under FRCP 50(a) should be granted only in cases where the evidence "is so one-sided that [WESTIN] must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-1105 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) [the evidence "points so strongly in favor of [the moving party] that reasonable minds could not come to a different conclusion"]. In making this determination, the district court must afford great deference to the fact finding function of the jury, which includes the power to draw all reasonable inferences from the evidence in support of the verdict. *California Computer Products, Inc. v. International Business Machines Corp., supra*, 613 F.2d at 733. If the court finds that the evidence "provide[d] a sufficient probative basis upon which a jury could reasonably reach a verdict," the motion must be denied. *Panter v. Marshall Field & Company*, 646 F.2d 271, 281 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) [quoting *Brady v. Southern Ry.*, 320 U.S. 476, 480 (1943)].

At trial, Petitioner met its burden of proof in demonstrating fraud on the part of Westin to support Petitioner's claim for punitive damages under California law.[10] Specifically, Petitioner introduced evidence which

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[10] State law governs the factors which the jury and, in turn, the court is to consider in awarding punitive damages. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1979); *Brown v. Royalty*, 535 F. 2d 1024, 1027 (8th Cir. 1976).

proved, among other things, that Westin concealed material information and concocted admittedly false economic projections to induce Petitioner to continue with the development of the proposed hotel project and sign Westin's Pre-Opening and Management Agreements.

Based on this evidence, the jury found that Westin had acted fraudulently and awarded punitive damages in the sum of $2 million. Nevertheless, the district judge granted Westin's motion for judgment as a matter of law on the punitive damages issue – thereby supplanting his personal determination of the facts for those of the jury.

Petitioner submits that the district court's rejection of the jury's determination of this issue violates the Seventh Amendment.

IV.

THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO INSTRUCT THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS WITH REGARD TO THE HANDLING OF INDICATIONS FROM A JURY THAT ITS VERDICT DOES NOT ACCURATELY REFLECT ITS DECISION.

Supreme Court Rule 10.1(a) provides that the Court may, in its judicial discretion, grant review when a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

"The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 647, n. 7

(1987); *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (STEVENS, J., concurring) ["As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."]; see also *United States v. Hale*, 422 U.S. 171, 181 (1975).

As stated by this Court, the task assigned to the jurors in our judicial system is to "tak[e] the law as given by the court, apply that law to the facts as they find them to be, and **express their conclusions in the verdict.**" See *Walker v. New Mexico S. P. R. Co.*, 165 U.S. 593, 596 (1897). In this case, the district court was faced with a common dilemma[11] – namely, what to do when the jury clearly indicates an intent to award damages in an amount different than indicated by the legal interpretation of its answers on the special verdict form?

Petitioner submits that the proper procedure in such cases is to seek clarification from the jury in the most unobtrusive manner possible. See *Dickerson v. Pritchard*, 706 F.2d 256, 259 (8th Cir. 1983) [where the jury indicates it was confused by the verdict form, "the Court . . . proceeded **intelligently** to attempt to correct that confusion" by resubmitting the case to the jury rather than accepting the original verdict].

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[11] As one might expect, the error made by the jury in this case appears to be quite common. See *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 963 (5th Cir. 1981) [jury improperly divides the total damages awarded among the several defendants]; *Grober v. Capital Transit Co.*, 119 F.Supp. 100, 107 (D.D.C. 1954) ["jury had agreed upon a total recovery for (plaintiff, but) . . . was confused about their right to apportion the verdict"].

The District Court's answer in this case was to ignore the jury's expression of its true intent and enter a judgment completely devoid of any basis in the evidence. The Ninth Circuit's approach was even more alarming: To declare the jury's intent of no importance to the adjudicative process and sidestep this important issue in a 3½ page memorandum opinion which misconstrues the record.

Petitioner urges this Court to grant the writ in this case to provide the federal judiciary with guidance on significant issues which will undoubtedly be raised time and again with the proliferation of special verdict forms and the use of written interrogatories to juries. The Court's direction on this issue will do much to bridge the growing gulf between the judiciary and the public it serves.

CONCLUSION

In reciting the grievances against King George in the Declaration of Independence, Thomas Jefferson included:

> For depriving us in many cases of the benefits of Trial by Jury.[12]

This injustice was remedied by the enactment of the Seventh Amendment to the United States Constitution, which "preserved" the right of trial by jury and mandated that "no fact tried by a jury shall be otherwise re-

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[12] Fisher, H. Richmond, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 512 (1973).

examined in any Court of the United States, than according to the rules of the common law."

In this case, Petitioner was effectively denied its right to trial by jury and, as a result, was deprived of over $6 million in damages. More importantly, by its decision, the Ninth Circuit has signalled its intention to continue to deprive future litigants of this most sacred right guaranteed by the Constitution. Petitioner respectfully requests the Court grant this petition for writ of certiorari to review the Ninth Circuit's erroneous decision and forestall the resulting encroachment upon the Seventh Amendment.

DATED: November 10, 1994 Respectfully submitted,

PROCOPIO, CORY,
HARGREAVES
& SAVITCH

By: DAVID A. NIDDRIE

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	*	No. 93-55095
Plaintiff-Appellant,	*	D.C. No. CV-89-01466-ACM
v.	*	
WESTIN HOTEL COMPANY, a Delaware corporation,	*	
Defendant-Appellee.	*	
L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	*	No. 93-55112
Plaintiff-Appellee,	*	D.C. No. CV-89-01466-ACM
v.	*	**MEMORANDUM***
WESTIN HOTEL COMPANY, a Delaware corporation,	*	
Defendant-Appellant.	*	(Filed May 31, 1994)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

App. 2

Appeal from the United States District Court
for the Southern District of California
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted May 4, 1994
Pasadena, California

Before: **KOZINSKI** and **TROTT,** Circuit Judges, and **WILLIAMS,**** District Judge.

L.E.S. Properties ("L.E.S.") appeals, and Westin Hotel Co. ("Westin") cross-appeals, the district court's judgment following a jury trial on L.E.S.'s tort and contract claims arising out of a failed hotel venture. This is a diversity action in which California law applies.

I

L.E.S. first claims the district court was required to enter a judgment of $5,570,250 in compensatory damages to comply with the jury's intended verdict. L.E.S. does not appear to argue that the jury could aggregate the awards on its numerous claims; rather, it asserts that the jury intended to award $5,570,250 on *each.* However, this is clearly contrary to the special verdict form, wherein the jury awarded various amounts on the various theories of recovery. And, to the extent the jury did seek to aggregate the separate awards, as it seems to have indicated in its response to the judge's question, it was not entitled to do so. L.E.S. asserted multiple theories of recovery – with "[common] issues of fact and proof," RT of 10/27/92 at

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**The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

19 – so that the separate awards are duplicative of each other; L.E.S. could only recover on one. *Shell v. Schmidt*, 126 Cal. App. 2d 279, 291 (Cal. Ct. App. 1954). In essence, the special verdict form forced the jury to consider the legal bases for L.E.S.'s claims, when it seems to have wanted only to decide how much the case as a whole was worth.

The trial judge properly awarded L.E.S. $1,457,000 in compensatory damages for negligent misrepresentation, the highest award among the various causes of action.

II

L.E.S. also claims the district court erred in granting judgment pursuant to Fed. R. Civ. P. 50 in favor of Westin on its punitive damages claim.

A. L.E.S. first claims the district court erred in entering this judgment because Westin did not assert the insufficiency of proof of punitive damages in a motion for judgment as a matter of law at the close of plaintiff's case. But Rule 50 contains no such requirement: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury." Fed. R. Civ. P. 50 (a)(2). Westin made its motion – including a claim of insufficient evidence to support an award of punitive damages – at the close of all the evidence. This was perfectly proper.

B. We must therefore decide whether "the evidence and inferences, viewed in the light most favorable to the nonmoving party, can support only one conclusion: that

the moving party was legally entitled to a favorable judgment." *City of Phoenix v. COM/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983). To recover punitive damages, L.E.S. had to show "by clear and convincing evidence that [Westin was] guilty of oppression, fraud, or malice," Cal. Civ. Code § 3294, that it "act[ed] with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights." *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462 (1974). L.E.S. did not make such a showing.

We agree with the district court that the evidence L.E.S. presented did not sufficiently support an award of punitive damages. Westin was entitled to judgment as a matter of law on this issue.

III

Westin claims the district court erred in instructing the jury to consider a breach of the implied covenant of good faith and fair dealing in the Pre-opening Services Agreement because there was insufficient evidence that it breached that agreement. Westin, however, did not move for judgment as a matter of law on that issue, as required by Fed. R. Civ. P. 50(b). There is no authority in this circuit to support Westin's argument that its objection to Jury Instruction No. 19 was sufficient to comply with Rule 50(b)'s requirements; it is thus precluded from challenging the sufficiency of the evidence on appeal. *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988); *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1347 (9th Cir. 1985).

IV

Westin also claims the district court erred in awarding L.E.S. its attorney's fees and litigation expenses. We apply state law in reviewing its claim, *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985), and we find no error. Both parties had agreed that the prevailing party would be entitled to reasonable attorney fees "[i]n any legal proceeding of any nature . . . involving the . . . enforcement of any of the terms of [the Pre-Opening Services Agreement]." Those terms included, among others, an implied covenant of good faith and fair dealing, *Seaman's Direct Buying Servs., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 768 (1984), that the jury found had been breached. L.E.S. was thus entitled to recover reasonable attorney's fees and litigation expenses. Cal. Civil Code § 1717; *see Bussey v. Affleck*, 225 Cal. App. 3d 1162, 1166 (Cal. Ct. App. 1990).

AFFIRMED.

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	No. 93-55095
Plaintiff-Appellant,	D.C. No. CV-89-01466-ACM
v.	
WESTIN HOTEL COMPANY, a Delaware corporation,	
Defendant-Appellee.	
L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership,	No. 93-55112
Plaintiff-Appellee,	D.C. No. CV-89-01466-ACM
v.	
WESTIN HOTEL COMPANY, a Delaware corporation,	**ORDER**
Defendant-Appellant.	(Filed Aug. 16, 1994)

Before: **KOZINSKI** and **TROTT**, Circuit Judges, and **WILLIAMS**,* District Judge.

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*The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-860

In The

Supreme Court of the United States

October Term, 1994

L.E.S. PROPERTIES HOTEL VENTURE, L.P.,
A California limited partnership,

Petitioner,

vs.

WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Constitution require that a trial judge look behind an **unambiguous** jury verdict to determine how the jury "really intended" damages should be computed?

2. Does the Constitution prohibit a trial judge from ruling as a matter of law that a plaintiff has failed to prove fraud by clear and convincing evidence?

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No. 94-860

In The

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October Term, 1994

L.E.S. PROPERTIES HOTEL VENTURE, L.P.,
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WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTE INVOLVED

Federal Rule of Evidence 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on

the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

I.

STATEMENT OF THE CASE

This is a lawsuit between a sophisticated hotel developer – L.E.S. – and Westin Hotel Company, a hotel management company. In the Fall of 1988, the parties entered into a "Letter Agreement" that anticipated the negotiation of formal management agreements and contemplated Westin "promptly" would prepare a Preliminary Pro Forma projecting financial results for a proposed luxury hotel in San Diego. Westin was delayed in submitting its initial Pro Forma,[1] which caused the Developer to expend substantial money designing and preparing for construction of the hotel; when a correct Pro Forma finally was submitted in the Summer of 1989, the Developer was forced to abandon the project and incur a significant loss.

The Developer filed suit, and at trial L.E.S. sought damages based on a contention the Letter Agreement

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[1] This statement of fact is made from a perspective that is most favorable to the Plaintiff. The "timeliness" issue was contested at trial and formed the basis for the entire lawsuit between the parties. While Westin contended it had performed its obligations under the Letter Agreement with due care, the jury found otherwise.

required that Westin provide an accurate Pro Forma sooner than it had done. Damages included avoidable out-of-pocket costs, as well as loss in the value of the real property on which the hotel was to have been constructed. The parties agreed on a specific form of verdict that required the jury to find for one of the parties on each of the various liability theories asserted and to determine what amount of damages, if any, had been caused by that wrongful act (*see*, Verdict attached as Appendix A).

Upon completion of the evidence at trial, Westin moved for judgment as a matter of law on the question of punitive damages, arguing that even though there might be sufficient evidence from which a jury could find by a ***preponderance of the evidence*** under California law that a fraud had been committed, there was insufficient evidence to prove an entitlement to punitive damages by ***clear and convincing evidence***. The trial judge took Westin's motion under submission and announced an intention to allow the jury's consideration of the punitive damages issue, despite the court's view that the Plaintiff had failed to prove a compelling case of fraud. The court said:

> I think this [Westin] was a legitimate, reputable company that made a mistake. There is evidence of negligence of course. I don't find any evidence that the April pro forma was given to L.E.S. with the intent of deceiving them. I think it was an honest mistake where they didn't get the April pro forma to them in time. I think the evidence is clear that the last pro forma, number 4, was given in an attempt to tell L.E.S. that Westin honestly felt that there was a change in

> conditions that they were not recommending that L.E.S. go ahead with the project.
>
> I don't have any problems with the award that was made; but I really have some real problems as to whether the evidence came even close to meeting the clear and convincing standard that's required for punitive damages. . . .

Reporter's Transcript of September 4, 1992, pp.56-57.

The jury found for the Plaintiff on the negligence, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, breach of contract, intentional misrepresentation and intentional concealment theories; it found for Westin on the breach of fiduciary duty theory. The jury's verdict included a different damage award for each of the theories on which liability was found, and the jury also found that the Developer should be entitled to punitive damages. The verdict was clear and unambiguous; a poll of the jury confirmed that the verdict was accurate, at which point the jury was excused and instructed to return the following day for deliberations on punitive damages.

The jury returned the next day, and after it had retired to consider punitive damages, the presiding juror submitted a question to the trial judge: "Are the damages that were awarded accumulative [sic]?" Over Westin's objection, the presiding juror was asked what was meant by the question, and she responded:

> We just want to make sure the damages awarded in each one of those counts – are those, at the end, cumulative? All the amounts that we added up – we had a certain figure that we were going to award? We wanted to make sure that

> we understand they were all cumulative damages.

Despite Westin's further objection, the jury then was asked the following Supplemental Special Interrogatory: "On your verdict dated September 3, 1992, did you intend to award L.E.S. the total of all claims, which is $5,570,250?" After deliberation, the jury responded in the affirmative.

The trial court entered judgment in the amount of $1.457 million on the negligent misrepresentation theory alone, plus attorney's fees, costs and litigation expenses. Westin moved for judgment as a matter of law, or in the alternative, new trial, based on the punitive damages award. The court ruled that fraud had not been shown by clear and convincing evidence, and judgment regarding punitive damages was entered in Westin's favor; the motion for new trial was denied as moot.

On appeal, the Court of Appeals for the Ninth Circuit rejected the arguments currently advanced in support of the Petition. A subsequent request for a rehearing was denied, and as no judge requested a vote, the petition for en banc review also was denied.

II.

REASONS FOR DENYING THE WRIT

This case has no business occupying the time of the Supreme Court for two reasons. **First**, in a belated attempt to reform a stipulated form of verdict, the Petitioner mistakenly advocates a constitutional right to determine a jury's "true intent," even though there never

was any ambiguity on the face of that jury's verdict. The Petitioner mistakenly would invite a post-verdict judicial exploration of the jury's mental processes, contrary to Federal Rule of Evidence 606. And given the facts of this case, there is no conflict in the decisions of the Circuits. **Second**, there is no need for this Court to second guess the trial judge and re-weigh the evidence on the question of punitive damages that the lower courts found insufficient to constitute clear and convincing evidence of fraud.

A. There Is No Constitutional Requirement For A Post Verdict Inquiry To Probe The "True Intent" Of An Unambiguous Jury Verdict.

Firmly grounded in our system of jurisprudence is the concept that a trial court must protect the mental processes of jurors from scrutiny, either by the court or the individual litigants. *E.g., Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (1866); *Woodward v. Leavitt*, 107 Mass. 453 (1871). This proposition was embraced in *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), when this Court articulated three reasons to exclude juror testimony. First, such testimony encourages post-trial harassment of the jurors. Second, it discourages open discussions within the jury room. Third, admitting such testimony interferes with the finality of litigation. *Id.* at 267-68.

Our jury system values finality in verdicts – a policy consideration that was examined in *Robles v. Exxon Corp.*, 862 F.2d 1201 (5th Cir. 1989). Although the face of the verdict form in *Robles* revealed consistent findings by the

jury, the trial court concluded that the jury had misunderstood the original instructions. Upon learning it had been the jury's true intent that the plaintiff recover some damages (in contradiction of the jury's original verdict), the trial court sent the jury back to reconsider its verdict. Judgment then was entered on a second verdict. In reversing and ordering judgment entered on the first verdict, the Court of Appeals succinctly stated the rule:

> Although the court may re-submit special interrogatories to a jury prior to discharge if the jury's original answers to the interrogatories are irreconcilably inconsistent, Rule 58(2) [of the Federal Rules of Civil Procedure] and the Seventh Amendment [of the Constitution] ***command that judgment be entered on the verdict if the jury's answers are clear and consistent.***

Id. at 1204 (emphasis added). *Robles* teaches that once a verdict is returned by the jury and a legally sustainable judgment can be culled from that verdict, it must be approved and judgment entered.

When post-verdict questioning necessarily would probe the jurors' deliberative processes, it is improper. Indeed, the jurors' intent is secondary and often must yield to paramount legal standards that may well conflict with what a jury intended. In *Chicago, Rock Island and Pacific Railroad Company v. Speth*, 404 F.2d 291 (8th Cir. 1968), the court said:

> To allow a judge to question a jury's process of deliberate decision, even though done in good faith to avoid an apparent miscarriage of justice, could result in abuses far outweighing the infrequent inability to correct what may *appear* to be, or is, erroneous or a misunderstanding. ***And this***

> ***must be true, even though reconsideration by the jury results in a verdict more accurately reflecting the jury's intentions.***
>
> . . . .
>
> It is well settled that the jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict. These matters all inhere in the verdict itself.

Id. at 295 (second emphasis added).

The principles underlying the foregoing case authority were codified in Federal Rule of Evidence 606(b) which protects the privacy of jury deliberations. The Rule recognizes the need for finality to litigation and for jurors to engage in the full and free debate necessary for just verdicts. Otherwise, jurors would fear scrutiny of their deliberations in post-trial litigation. (Notes of Committee on the Judiciary, Senate Report No. 93-1277; Notes to Federal Rule of Evidence 606(b).) It is clear that "the mental operations and emotional reactions of jurors in arriving at a given result" are not to be used as a means of impeaching a verdict, even when juror testimony would show that the jury misunderstood the trial court's instructions. (Notes of Advisory Committee proposed Federal Rule of Evidence 606(b).)

Since the adoption of Rule 606(b), the vast majority of the courts interpreting the Rule have precluded juror testimony or submission of supplemental interrogatories to aid in understanding the jury's verdict. The limited exceptions exist when the verdict (i) is irreconcilably

inconsistent on its face or (ii) there has been a clerical error in filling out the verdict form.

In *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989), after the jury eventually returned an unambiguous verdict, the trial court resubmitted the damage award for clarification. On appeal, the judgment was reversed, because the resubmission had not been designed to clarify a clerical error, but instead was directed at the mental processes of the jurors. As such, it was in violation of Rule 606(b):

> The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the Court's instructions and concerns the jurors' full mental processes, which is forbidden by the rule.

Id. at 74-75.

Probing a clear, unambiguous verdict to determine "what the jury *really* intended" would not resolve doubts about the accuracy of the verdict; it only would question how the jury's decision was reached. That is precisely what Rule 606(b) forbids. The only exception is for "juror testimony concerning whether the verdict was affected by 'extraneous prejudicial information' or 'any outside influence.' " *E.F. Hutton & Co., Inc. v. Arnebergh*, 775 F.2d 1061, 1063-64 (9th Cir. 1985), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2248, 90 L. Ed.2d 694 (1986). The discipline of this

Rule has been applied with equal force to preclude post-verdict questioning of jurors:

> In general, jurors will not be heard to impeach their verdict . . . This means particularly that juror affidavits or testimony will not be received concerning the manner in which the jury arrived at its verdict. . . . Because a verdict may not be impeached on the basis of the jury's internal deliberations or the manner in which it arrived at its verdict, the practice of counsel in propounding questions on these subjects to jurors after trial should be discouraged.

Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980) (citations omitted).

This Court has imposed no constitutional requirement for a post-verdict inquiry when a jury verdict is unambiguous and facially consistent. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 364 (1962), only stands for the proposition that "where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Id.* at 364. What the Petitioner seeks from this Court is an award of damages that differs from the various amounts indicated on the special verdict form, but unlike *Atlantic*, there was no inconsistent verdict to resolve. The jury went into its deliberations with a mutually agreeable, fully instructed verdict form, and it returned with a completed verdict that was facially consistent. The Petitioner's contention that the case at issue conflicts with previous decisions of this Court is incorrect.

Neither is there merit to the argument that there is a conflict in reported decisions of various Circuit Courts of

Appeals. The cases cited by the Petitioner are largely irrelevant to the matters at issue, and those authorities should be limited to their facts. Several of those decisions involve a verdict inconsistent on its face – a circumstance that is absent in this case. For example, *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576-77 (3d Cir. 1983), and *Guidry v. Kern Mfg. Co.*, 598 F.2d 402, 405 (5th Cir. 1979), each concerned clarification of facially inconsistent verdicts. Other decisions cited by the Petitioner concerned verdicts that were logically inconsistent and legally unsupportable. In *Dickerson v. Pritchard*, 706 F.2d 256, 259 (8th Cir. 1983), the court resubmitted a verdict that awarded punitive damages without also awarding compensatory damages.

The only authorities cited by the Petitioner that do not involve a facially inconsistent or legally unsustainable verdict are *Attridge v. Cencorp*, 836 F.2d 113 (2d Cir. 1987); *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991); *Ferrante v. Metro-North Commuter R.R.*, 738 F. Supp. 106 (S.D.N.Y. 1990).[2] These cases involved

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[2] *Ferrante* followed *Attridge* reluctantly: "As adopted, Rule 606(b) expresses a preference for certainty and freedom from post verdict inquiries, even when it is manifestly clear that the jury did not understand or follow the court's charge. The Rules Committee certainly must have realized that such an approach would work some hardships, but, as adopted, Rule 606(b) reflects the reasoned judgment of the Committee that this was a necessary result. . . . Nevertheless, *Attridge* controls this court's actions. Under that case, the court is permitted to take notice of a jury's unanimous post-discharge statement that it did not intend the court to follow previously announced procedures concerning the reduction of an award. In light of the criticism of *Attridge*, the court has considered whether it should be limited to the specific facts of that case." *Id.* at 109.

personal injury claims in which the jury assigned a portion of fault to the plaintiff and proceeded to award damages. After the verdict was announced, in each case the trial court inquired whether the amount on the verdict form was the total amount of damages yet to be reduced by the plaintiff's comparative negligence, or had the amount already been reduced. Because the jurors in those cases indicated that their decision was contrary to the court's instructions and already reflected a reduction by the percentage of fault, the court proceeded to enter judgment on a mathematically increased amount. Each of those cases involved verdicts with potentially ambiguous findings, but once a carefully limited question was asked, the intended verdicts were clear. None of these cases involved probing the underlying rationale by which the jury had arrived at its assessment of the actual damages.

None of the cases on which the Petitioner relies involved reapportioning damages between multiple liability theories. None required extensive questioning of jurors about the rationale for their complex, yet facially consistent verdict. To the contrary, the Petitioner's cases only involved apparent jury misunderstanding with regard to one special interrogatory in the original verdict form, and the decisions avoid intrusion into the methodology by which the jury had assigned its multiple damage awards. Limited to their facts, these cases do not present any notable conflict in controlling decisions of various Circuits.

The Petitioner's case law notwithstanding, this lawsuit does not present any issue that warrants further review. There never was any verdict ambiguity in the first place. It is clear that the jury found L.E.S. was damaged

in the amount of $1.457 million based on Westin's negligent misrepresentations about the Pro Forma's projections, $1.444 million for Westin's breach of the Letter Agreement's obligation to provide the Pro Forma "promptly," $375,000 for Westin's negligent delay in providing the Pro Forma, and so on. The jury's intent beyond that is not clear, even after the objectionable Special Interrogatory was answered.

When the jury's answer to the Special Interrogatory is considered, it appears that the jury mistakenly thought the law ought to allow the Developer to receive the aggregate of the individual damage awards, but there is nothing that compels a conclusion that the jury first had computed the total award and then broke it into smaller pieces that were allocated to each liability theory. It is just as reasonable to speculate that the jury did what it was instructed to do – calculate what damage was caused by negligence, what damage was the result of a contractual breach and so forth – and then totalled the individual awards, incorrectly thinking that multiple recovery should be permitted.[3] If that is what the jury had in mind (and we shall never know to a moral certainty what the jurors really intended), then to aggregate the several damage awards would be to award the Plaintiff multiple

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[3] For example, if after returning its original verdict the jury was told one of the six counts on which liability was found had been dismissed, would the jury have asked to reapportion the $5.57 million among the remaining counts, or would it have asked to "re-accumulate" the remaining damage figures to arrive at a new, lesser award amount? Obviously, neither the litigants nor the Court can answer this question with any certainty.

recoveries for the same wrong merely because it was able to characterize the wrongdoing six different ways. This simply is not permitted. *DuBarry International, Inc. v. Southwest Forest Industries, Inc.*, 231 Cal. App.3d 552, 282 Cal. Rptr. 181 (1991).

B. The District Court Was Correct in Ruling That The Plaintiff Failed To Prove Fraud By Clear And Convincing Evidence.

When jurisdiction is founded on diversity, state substantive law governs the circumstances justifying the award of punitive damages, and federal law governs review of the jury award by the trial and appellate courts. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79, 109 S. Ct. 2909, 106 L. Ed.2d 219 (1989). If the evidence is too sparse to support punitive damages, as a matter of law, an award of exemplary damages should not stand. *E.g., Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1101, 102 S. Ct. 3474, 73 L. Ed.2d 1362 (1982), *pertinent grounds affirmed on remand by* 691 F.2d 634 (3d Cir. 1982). Indeed, a trial court may set aside a jury verdict supported by a prima facie case when that verdict is contrary to the **clear weight** of the evidence. *E.g., Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1373 (N.D. Cal. 1993).

This whole issue arises because controlling California law permits recovery of compensatory damages for fraud upon proof by a preponderance of the evidence. *E.g., Sierra National Bank v. Brown*, 18 Cal. App.3d 98, 104-06, 95 Cal. Rptr. 742, 746 (1971). However, California Civil Code section 3294 provides that punitive damages only

may be awarded "where it is proven by **clear and convincing evidence** that the defendant has been guilty of oppression, fraud or malice. . . . " (emphasis added). The trial court correctly applied these different legal standards.

The Petitioner asks the Court to revisit the facts and determine if the trial judge was correct in ruling as a matter of law that there had been a failure to prove fraud by clear and convincing evidence. The trial judge heard the evidence, listened to the witnesses, weighed their credibility and concluded that the evidence fell far short of meeting the standard required for punitive damages. Whatever negligence there may have been, this was not a case of Westin intending to "vex, injure or annoy" anybody. *See, e.g., Betts v. Allstate Insurance Co.*, 154 Cal. App.3d 688, 709, 201 Cal. Rptr. 528 (1984). The Court of Appeals concurred with that assessment of the evidence, and this is not an issue that warrants Supreme Court attention.

Even if there had been sufficient evidence of fraud to satisfy a clear and convincing standard, the fact remains that L.E.S. sued and recovered on multiple theories, some of which permit recovery of punitive damages, some of which do not. While a plaintiff is entitled to plead and prove multiple theories based on the same set of facts, it ultimately must elect a single theory on which to have judgment entered. The theory chosen must legally support recovery of punitive damages. *Lew Wenzel & Co. v. London Litho Supply Co., Inc.*, 563 F.2d 1367 (9th Cir. 1977).

Judgment in this matter was entered on a negligent misrepresentation claim which did not support an award

of punitive damages. *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App.3d 642, 155 Cal. Rptr. 843 (1979). The jury did find for the Plaintiff on the intentional misrepresentation and intentional concealment theories – the only claims on which the liability findings will support punitive damages – but the actual damages attributable to those theories of wrongdoing were less than the damages caused by negligent misrepresentation, so it was understandable that judgment was entered on the negligent misrepresentation count. However, L.E.S. cannot have judgment for the largest damage award and eat its cake too.

III.

CONCLUSION

There is no reason to grant the Petitioner's request for a Writ of Certiorari. Given that the verdict in this case was on an agreed form and was unambiguous as returned by the jury, settled case law and Federal Rule of Evidence 606(b) proscribe the temptation to reach behind the verdict and inquire *how* or *why* the jury arrived at its damages award. The sanctity of the jury's thought processes should be preserved. Further, the trial judge was in the best position to determine whether there was clear and convincing evidence of fraud sufficient to support an award of punitive damages. There is no reason to plow that ground again. This Petition for Writ of Certiorari should be denied.

DATED: December 14, 1994

Respectfully Submitted,

BAKER & MCKENZIE
CHARLES H. DICK, JR.
Attorneys for Westin Hotel Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership, Plaintiff, v. WESTIN HOTEL COMPANY, a Delaware corporation, Defendant.	CIV 89-1466 ACM (M) V E R D I C T

(You are to assess the total damages as to each of the Claims. Plaintiff, however, is entitled to one recovery, which is to be determined by the Court.)

We the jury, being duly empaneled, Find as follows:

1. NEGLIGENCE CLAIM

In favor of the Plaintiff L.E.S. Properties (L.E.S.)

YES X NO _____

If NO, go to next Claim.

If YES, what is the total amount of damages to which L.E.S. is entitled [without any reduction for L.E.S. contributory negligence]?

$ 375,000

Was L.E.S. contributorily negligent?

YES X NO _____

If YES, what proportion or percentage is attributable to L.E.S. and Westin of the total combined negligence of the parties?

L.E.S. 25% Percent Westin 75% Percent

2. **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 500,000

3. **BREACH OF CONTRACT**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 1,444,000

4. **BREACH OF FIDUCIARY DUTY**

In favor of the Plaintiff L.E.S.

YES _____ NO X

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ _____

5. **NEGLIGENT MISREPRESENTATION**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 1,457,000

6. INTENTIONAL MISREPRESENTATION

In favor of the Plaintiff L.E.S.

YES ___X___ NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 944,000

7. INTENTIONAL CONCEALMENT

In favor of the Plaintiff L.E.S.

YES ___X___ NO _____

If NO, go to Punitive Damages.

What is the total amount of damages to which L.E.S. is entitled?

$ 944,000

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PUNITIVE DAMAGES

Is L.E.S. entitled to recover punitive damages from Westin?

YES X NO _____

DATED: 9/7/92

Denise R. Garrett
FOREPERSON